ensues from the breach of the duty, no blame or loss ought to follow. If the plaintiff did not contribute to his own injury by being where he was, instead of where he had agreed to be, at the moment of the accident, this would prove that the accident was entirely independent of his agency. This was for the jury to ascertain from the evidence, and so it was submitted to them, and they have found the point in favor of the plaintiff, and allowed damages. It may be they might, with better justice, have come to a different conclusion. But if so, which we do not assert, we cannot correct it. Only in case of clear error can the court properly interfere with the verdict, the jury being constitutional triers, within their sphere, as truly as the court.

These views do not—at least they are not intended to—impinge upon the principle of the cases of *Railroad Company* v. *McCloskey*, 11 Harris 520; *McCully* v. *Clark & Thaw*, 4 Wright 406; nor *The Railroad Company* v. *Aspell*, 11 Harris 149. Indeed, we accord fully with them so far as their principles are applicable to the circumstances of this case. The cause of the injury here was in no way attributable to the plaintiff; but still it was a question whether his acts or position at the moment of the accident contributed to his own injury. That was a question for the jury, and we see no error in the charge in submitting it to them.

Judgment affirmed.

Superior Court of Cincinnati.

S. E. AMSINCK ET AL. *v.* WILLIAM HARRIS.

An order of attachment, issued by the clerk of this court, on an insufficient affidavit, is in effect "*coram non judice*," and therefore void, for the want of jurisdiction.

Where such an order is dismissed, or vacated by the court, the rule applicable to other judicial proceedings, where courts will not take jurisdiction, applies.

Therefore the dismissal of the order does not prevent a subsequent arrest for the same cause of action: the maxim "*bis vexari*" does not apply. A proceeding instituted where no jurisdiction exists, being void, it cannot be held to forbid another proceeding, neither as a bar or in abatement.

Caldwell & Forrest, for plaintiffs.

Gholson & Challen, for defendant.

The opinion of the court was delivered by

STORER, J.—This is a motion reserved from Special Term on the application of defendant, to dismiss an order of arrest, on the ground that the defendant had been once in custody for the same cause.

The facts appearing in the case are these:—

On the 31st day of March last, the plaintiff commenced his action in the court against the defendant to recover $14,000, which he claimed to be due to him for the price of merchandise sold; on the same day a summons was served upon the defendant to appear. An order for the arrest of the defendant was issued at the same time by the clerk of the court, on an affidavit filed by the plaintiff's agent, claiming under the Code the right to arrest the defendant for various fraudulent acts. On this order the defendant was taken into custody by the sheriff, and an application was subsequently made to one of our colleagues in Special Term to vacate the order, on the ground that the affidavit upon which the order issued did not conform to the requisitions of the Code; the motion was overruled, and the question as to the sufficiency of the affidavit was taken to the General Term upon error, where it was finally decided that the affidavit was insufficient to authorize the arrest, and the ruling in Special Term being thereupon reversed, the order of arrest was vacated, and the defendant discharged from custody.

After this the plaintiff filed another affidavit with the clerk, whereupon a second order of arrest was issued and the defendant taken into custody by the sheriff, after which an application was made by his counsel to a judge in Special Term to vacate the last order of arrest, on the ground that he could not be arrested a second time for the same cause, or in the same action; upon this motion, after argument, the questions involved were reserved for our opinion in General Term.

The question to be decided is, therefore, this,—can the last order of arrest be sustained?

The principle underlying the rule which is claimed to prohibit a second arrest, "*nemo debet bis vexari pro eadem causa*," applies equally to prevent the pending of two actions for the same cause, at the same time, as well as the commencement of another action after the first shall have been fully determined, and espe

cially protects a party when the plea of former conviction, or former acquittal, is interposed in a criminal proceeding.

It has its foundation among the oldest maxims of the common law, which has been incorporated, in its letter or spirit, into the constitutions of all the states of the Union.

No one shall be twice put in jeopardy for the same offence, is the germ from which, both in civil and criminal tribunals, from time to time, have sprung up the different modifications and applications of the ancient rule. To understand the true reason of the rule, it is proper to examine and ascertain definitely the meaning of the terms "twice in jeopardy."

It was formerly held in many of the states, that a party once indicted for a crime could not be charged a second time for the same offence, though there had been no trial upon the merits, as where the jury were discharged for disagreement, or the indictment was quashed, or the judgment arrested; but it is now held, we believe, in all the courts, that nothing short of an actual conviction or acquittal is a bar to a subsequent prosecution; and the same rule is observed in the trial of civil actions, without any exception; no judgment but a final one upon the merits can avail to defeat a second action.

Hence pleas to the jurisdiction, in abatement, as well as all dilatory pleas, as they determine nothing but the right of the court to try, or the propriety of process, cannot be considered as putting a party in jeopardy, within the reason of the principle to which we have alluded.

Chief Justice KENT, in *The People* v. *Olcott*, 2 Johns. Cases 301, and Judge SPENCER, in giving the opinion of the court in the celebrated case of *The People* v. *Goodwin*, 18 Johns. 200, have exhausted the law on the subject.

Since these decisions were made very many cases have arisen, both in England and in our own country, in which the courts have explained more fully the application of the rule we have discussed, with its various modifications.

They are very carefully collected by Mr. Wharton in the second volume of his excellent work on American Criminal Law, under the title of "Once in Jeopardy," §§ 572–591, and furnish an interesting topic for legal examination.

In order to sustain the plea of former acquittal, or conviction, the court who tried the case must have had jurisdiction, else

there has been no final determination of the matter litigated: *Rex* v. *Bowman*, 6 Carrington & Payne 337; *Com.* v. *Peters*, 12 Metcalf 387; *Marston* v. *Jenness*, 11 N. H. 156; *McCann's Case*, 14 Grattan 570.

If such is the law in relation to criminal offences, where life or limb may be in peril, we may readily trace the analogy of the principle to civil remedies.

In England from a very early day the subject of arrests, and discharge on common bail, has claimed very great attention where the courts have been asked to grant or restrain process.

There has not been until the reign of the present Queen any statutory provision defining the remedy, the right to arrest being always regulated by the circumstances of the case, and the discretion of the judges, who have always exercised in the special case their sound discretion. There never was, nor is there now, a general rule that is merely arbitrary without exception or limitation.

The cases referred to by counsel, when carefully examined, fully establish the fact, that even in those exceptional cases, where it would appear a second arrest was not consistent with the usual practice, it must be evident there is a disposition to harass and vex, rather than the honest pursuit of a legal right.

We find in the New York cases quoted in argument no well-established rule, but, rather, an hypothesis assumed, or proposed; not what we should respect as the exposition of a legal principle, while a series of decisions by the courts of that state have announced a rule, which, if it is sound, disposes without difficulty of any embarrassment there which nisi prius adjudications, and obiter dicta, may on first examination appear to have created.

Thus in *Matter of Faulkner*, 6 Hill 601, it was held by Judge BRONSON that the affidavit for process always gives jurisdiction to the court to grant it. In *Broadhead* v. *McConnell*, 3 Barb. 175, it was expressly decided, that if the warrant of arrest is issued without the proof required by statute, the warrant is void, no jurisdiction having attached to the officer who issued it.

The precise question came before our Superior Court in *Spice & Son* v. *Steinruck*, 14 Ohio State Rep. 221. "The authorities cited," say the court, "and a just and proper regard for personal liberty, constrain us to hold, that where a creditor seeks to arrest his debtor under section 20 of the Justices' Code, he must comply

with all the conditions thereby prescribed, and must, therefore, state in his affidavit, among other things, '*the facts claimed to justify belief* in the existence' of the fraudulent act and intention set forth as a ground for the order. That until this is done, the justice has no legal authority to issue such order, and that an arrest under an order unsupported by such an affidavit, will be held void in whatever form the question may arise."

We must conclude, then, that the first order of arrest issued in this action was inoperative and void, conferring no right upon the officer to arrest, and, of course, none upon the tribunal who granted it. Being a void process, it was equivalent to no process, and though it may have been the instrument by which the defendant was deprived for a time of his liberty, the right of the plaintiff in the action was never adjudicated. The decision of the court, therefore, in vacating the order, was simply a denial of jurisdiction on their part, and could not avail to protect the defendant in any subsequent litigation, or to deny to the plaintiff another order of arrest.

Neither in the letter nor the spirit of the rule, "that no one shall be twice vexed in the same action," do we think the defendant can demand its application on this motion.

He has been legally arrested but once; the first arrest was absolutely void.

The motion, therefore, to vacate the order before us must be overruled.

Supreme Court of Illinois.

REEDER ET AL. *v.* PURDY AND WIFE.
SAME *v.* PURDY.

The Illinois Statute of Forcible Entry and Detainer, by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is, therefore, unlawful, and is a trespass for which an action of trespass will lie.

Where an action of trespass is brought for a mere entry by a landlord upon the possession of a tenant holding over, unaccompanied by any trespass upon either the person or personal property of the plaintiff, and merely constructively forcible, only nominal damages can be recovered; the *gravamen* of actions of this character being the trespass to the person and goods and chattels of the tenant.

The cases relating to the common-law right of an owner of land to enter forcibly upon the unlawful possession of another, collected and discussed.